ATTORNEYS FOR APPELLANT:

MICHAEL R. FRUEHWALD
CLAUDIA J. EARLS
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

JOHN JOSEPH TANNER
CLAYTON C. MILLER
KELLY S. WITTE
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

FLEX-N-GATE CORPORATION,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 23A05-0606-CV-342
	)	
TOWN OF VEEDERSBURG,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE FOUNTAIN CIRCUIT COURT
The Honorable Susan Orr Henderson, Judge
Cause No. 23D01-0402-PL-056

MARCH 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Plaintiff-Appellant Flex-N-Gate Corporation a/k/a MasterGuard Corporation (Corporation) appeals from the trial court's grant of summary judgment in favor of Defendant-Appellee Town of Veedersburg (Town). We affirm.

Corporation presents two issues for our review, which we consolidate and restate as: whether the trial court erred by granting summary judgment in favor of Town.

In 1995, Corporation and Town signed a Memorandum of Agreement (Agreement) which, among other things, provided for the rate at which Town would provide electrical service to Corporation. The terms of the Agreement also required Corporation to meet certain operating conditions by December 31, 1996. If Corporation failed to meet the conditions by this date, the Agreement provided that Corporation's electrical rates would be adjusted to the then current rate that would be applicable to Corporation in the absence of the Agreement. The Agreement also stated that Corporation would be subject to the adjusted rate until such time as Corporation met the certain operating conditions. Corporation did not meet the stated conditions by December 31, 1996, and its electrical rates were adjusted accordingly.

Thereafter, in March 1997, Town adopted an ordinance revising its utility rates because the existing rates were not producing sufficient revenue to pay the expenses incident to the operation of Town's electric utility. In doing so, the Town created a special rate class solely for Corporation. From that time forward, Town charged Corporation, and Corporation paid, for its electric use commensurate with the rate set forth in the 1997 ordinance. Subsequently in 2003, Corporation asserted that it had, in 2001, met the certain operating conditions as set forth in the 1995 Agreement, but the

electrical rates Town was charging Corporation were the rates provided for in the 1997 ordinance and not those in the Agreement. On February 6, 2004, Corporation filed its complaint against Town claiming that Town had breached the Agreement concerning electric rates. In February 2006, Town filed its motion for summary judgment, which the trial court granted on May 30, 2006. It is from this order that Corporation now appeals.

Corporation contends that the trial court erred by entering summary judgment in favor of Town. Particularly, Corporation argues that the trial court erroneously determined that the Agreement's provisions for electric rates for Corporation expired upon Town's adoption in 1997 of the ordinance providing for new electric rates.

On appeal from a grant of summary judgment, our standard of review is identical to that of the trial court. *Cox v. Northern Indiana Public Service Co., Inc.*, 848 N.E.2d 690, 695 (Ind. Ct. App. 2006). Summary judgment is appropriate only where the designated evidence shows there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Auburn Cordage, Inc. v. Revocable Trust Agreement of Treadwell*, 848 N.E.2d 738, 747 (Ind. Ct. App. 2006). Appellate review of a summary judgment motion is limited to those materials designated to the trial court. *Pond v. McNellis*, 845 N.E.2d 1043, 1053 (Ind. Ct. App. 2006), *trans. denied*, 860 N.E.2d 590. All facts and reasonable inferences drawn therefrom are construed in favor of the non-movant. *Id*.

A trial court's grant of summary judgment is presumed valid, and the party appealing the grant of summary judgment has the burden of demonstrating that the trial court's decision was erroneous. *Cox*, 848 N.E.2d at 695. "Summary judgment is proper

when conflicting facts and inferences exist as to some elements of a claim if there is no dispute as to facts which are dispositive of the matter." *Farm Equipment Store, Inc. v. White Farm Equipment Co., A Div. of Allied Products Corp.*, 596 N.E.2d 274, 275 (Ind. Ct. App. 1992). A grant of summary judgment may be affirmed upon any theory or basis supported by the designated materials. *Id.* We carefully review a summary judgment determination to ensure that a party was not improperly denied its day in court. *Pond*, 845 N.E.2d at 1053.

In its order granting summary judgment in Town's favor, the trial court found that, based upon the actions of the parties in the course of Town's adoption of the 1997 electrical rate ordinance, as well as the parties' course of conduct since that time, the provision of the Agreement regarding electrical rates expired as a matter of law upon the adoption of the 1997 ordinance.

The facts which were before the trial court are that in 1996 Town retained Jeffrey Laslie to conduct a cost-of-service study and to recommend appropriate new electric rates for Town. Based upon his findings, Laslie concluded that Town's electric rates needed to be rebalanced. Laslie recommended new electric rates for Town, including the establishment of a special rate solely for Corporation. In a letter to Laslie in November 1996, Corporation's counsel indicated he had been present at the town council meeting at which Laslie made a presentation. Corporation's counsel stated that Corporation was interested in providing any necessary input Laslie may require in order to develop an equitable industrial rate and suggested that Laslie contact Corporation's plant manager or plant facilitator. Corporation's counsel also acknowledged that the new rates would

affect Corporation. Laslie worked with Town and representatives of Corporation to develop a special electrical rate for Corporation. In doing so, Laslie consulted with Corporation's plant manager and Corporation's plant facilitator, as well as Corporation's counsel.

In March 1997, Town adopted the ordinance containing new electric rates for all rate classes, including residential service, commercial service, and large power service. A special rate class, entitled "Large Power Service to Masterguard Corporation," was designed solely for Corporation and was included in the ordinance. Corporation's counsel was present at the town council meeting at which the ordinance was adopted and asked the council how long the new rates would be in effect. He was told that because the rate classes had just been completely overhauled, the rates should be in effect for at least 3 to 5 years. Commencing in April 1997 and continuing to at least January 2003, Town billed Corporation for its electrical use based on the rates set forth in the 1997 ordinance. Corporation paid the electric bills it received from Town, without objection, for at least 68 months. In January 2003, Alan Dodds, Director of Finance for Corporation, contacted Town's Clerk Treasurer, Laura Bennett, to notify Town that in 2001 Corporation had allegedly met the certain operating conditions set forth in the 1995 Agreement and that the electric rates being charged to Corporation were not those provided for in the Agreement. In February 2004, Corporation filed its complaint against Town claiming that Town had breached the Agreement by failing to charge electric rates commensurate with its terms.

"'Waiver is an intentional relinquishment of a known right involving both knowledge of the existence of the right and the intention to relinquish it.'" *International Health & Racquet Club, Inc. v. Scott*, 789 N.E.2d 62, 66 (Ind. Ct. App. 2003) (*quoting van de Leuv v. Methodist Hosp. of Ind., Inc.*, 642 N.E.2d 531, 533 (Ind. Ct. App. 1994)). Generally, a party can waive any contractual right provided for its benefit. *Salcedo v. Toepp*, 696 N.E.2d 426, 435 (Ind. Ct. App. 1998). Waiver of a condition in a contract may occur by the conduct of the party. *Id*. Once a condition has been waived and the waiver has been acted upon, the failure to perform the condition cannot be asserted as the basis for breach of the contract. *Integrity Ins. Co. v. Lindsey*, 444 N.E.2d 345, 347-48 (Ind. Ct. App. 1983). Waiver may be implied by the acts, omissions, or conduct of a party to a contract. *Id*. at 348.

In the present case, the facts show that Corporation's acts and participation in the adoption of Town's new electrical rates in 1997, as well as its actions subsequent to the adoption of the new rates, waived the benefit provided for Corporation in the parties' Agreement regarding the applicable electrical rates once Corporation reached certain operating conditions. Corporation, through its counsel, plant manager and plant facilitator, openly and actively participated in Town's rate study process and in developing a special electrical rate that applied solely to Corporation. Corporation's counsel, plant manager, and plant facilitator directly communicated with Laslie, Town's rate consultant. Corporation's counsel was further involved in the development of the 1997 electrical rate ordinance by attendance at and participation in the town council meetings held by Town to discuss the new rate ordinance. At the council meeting in

which Town formally adopted the 1997 ordinance, Corporation's counsel was present and posed the question regarding the length of time for which the new rates would be in effect.

It is significant that the 1997 ordinance rates include an unconditional rate developed solely for Corporation and with input from Corporation. Corporation was given a new rate that was not conditioned upon obtaining and maintaining any operational conditions or standards. Once the new rates went into effect, Corporation paid its electrical bills, which were based on the 1997 ordinance rates, from April 1997 to January 2003 without objection. Nearly 6 years after the adoption of the new rates and commencement of billing thereof and two years after Corporation alleges it met the operating conditions contained in the Agreement, Corporation notified Town that its electrical rates were being billed using the 1997 ordinance rather than the Agreement. Corporation's participation in the setting of new, unconditional rates in 1997 applicable only to Corporation, as well as its continued payment of the 1997 rates despite allegedly satisfying the Agreement's operating conditions in 2001, constitute waiver of the rates provided for in the Agreement. Moreover, just as acts and conduct operate as waiver so too do omissions. *See Integrity Ins. Co.*, 444 N.E.2d at 348. We note that Corporation presents no facts to demonstrate that Corporation's counsel or anyone else representing Corporation indicated that the Agreement would continue to bind the parties after the adoption of the new electric rates in 1997.

In light of the facts before us, we can only conclude that Corporation's conduct and participation in developing an electrical rate applicable solely to its own operations

demonstrates its intent to be bound by those rates and to waive any condition regarding electrical rates as provided for in the Agreement. In addition, Corporation's failure to take any affirmative steps to show a contrary intent constitutes waiver of the condition in the Agreement. By operation of law, therefore, Corporation waived the electrical rate condition contained in the Agreement. Thus, the trial court properly granted summary judgment in favor of Town.

Affirmed.

FRIEDLANDER, J., and RILEY, J., concur.